IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,	)	CRIM. ACTION NO. 3:02CR00107
	)	
v.	)	
	)	MEMORANDUM OPINION
TERRY L. DOWDELL,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the defendant's Motion for Reconsideration, submitted July 30, 2003, and the government's Response to Defendant's Motion for Reconsideration, filed August 8, 2003. Upon consideration of the defendant's motion and the government's response and relevant case law, and for the reasons stated in the accompanying memorandum opinion, the court declines to modify its rulings denying the defendant's objections to the Presentence Report but will permit the defendant to withdraw his guilty plea pursuant to Federal Rule of Criminal Procedure 11(d)(2)(B).

I.

On December 19, 2001, the defendant, Terry Dowdell, pled guilty to a twenty-count information charging him with various financial crimes including one count of securities fraud in violation of 15 U.S.C. § 78j(b) & 78ff and 17 C.F.R. § 240.10b-5, eight counts of wire fraud in violation of 18 U.S.C. § 1343 and 2, and ten counts of money laundering in violation of 18 U.S.C. § 1957. Following the completion of a Rule 11 plea colloquy, the court found the defendant competent to enter an informed plea and found his plea to be knowing and voluntary and supported by an independent basis in fact. Accordingly, the court accepted the defendant's

plea and adjudged the defendant guilty of all twenty counts of the Information.

In conjunction with his plea of guilty, the defendant entered into a plea agreement with the government which provided, inter alia, that the government would recommend that the sentencing court apply the 2000 edition of the United States Sentencing Commission Guidelines Manual in determining the defendant's sentence, and that those Guidelines be applied in a fashion that was anticipated would result in a total offense level of twenty-eight. In addition, the government agreed not to further prosecute the defendant for any matters about which the government gained specific knowledge during the course of the investigation giving rise to the charges contained in the Information. As was discussed in some detail in this court's July 22, 2003 opinion, the plea agreement clearly contemplated that the government's sentencing recommendation was not in any way binding on the court, nor did it preclude the court's authority to sentence the defendant up to the maximum penalty provided by law.

As is the usual practice in this district, the United States Probation Office prepared a Presentence Report for the court to consider in determining the appropriate sentence. The Presentence Report concluded that, despite the terms of the plea agreement, the court should apply the 2002 edition of the Sentencing Guidelines Manual. Relying on the 2002 edition, the Probation Office reached a total offense level calculation of forty-three.

Of the fifteen-point difference in total offense level between the Presentence Report and the plea agreement, seven-points are fairly attributed to the parties' mutually mistaken

reliance on the 2000 edition of the Guidelines Manual.[1] This seven-point difference changed the total punishment required under the Guidelines from a range of 188 to 235 months to a mandatory sentence of life imprisonment.

II.

In the defendant's request that the court reconsider its July 22, 2003 rulings denying the defendant's objections to the Presentence Report, he makes two primary arguments. First, the defendant contends that the plea agreement into which he entered into was not, as this court concluded, a nonbinding plea agreement contemplated by Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, but rather a binding agreement made pursuant to Rule 11(c)(1)(C). Second, the defendant asks the court to use its equitable powers to grant the defendant the benefit of his plea bargain and thereby ensure that the purposes of the plea agreement are not frustrated. The court shall consider each of these arguments in turn.

A.

The nature of the plea agreement at issue in this case has been fully considered and was discussed in some detail in this court's earlier opinion. Despite the defendant's contention that the 2002 amendments to the Federal Rules of Civil Procedure implicitly create a new

[1] The remaining eight-point difference is accounted for by various factors that are unrelated to the parties mistaken application of the Guidelines, including the defendant's failure to qualify as anticipated for a three-point reduction in offense level for acceptance of responsibility, and additional upward adjustments in the defendant's offense level applied by the court pursuant to U.S.S.G. §§ 2B1.1(b)(8)(C), 3B1.1(a), 3B1.3, and 3C1.1.

"hybrid" form of plea agreement, the court concluded that the drafters of the rule intended no such change and therefore that a nonbinding plea agreements is not somehow converted into a binding agreement by the mere presence of a disclaimer of further prosecution.

The defendant now attempts to argue that the plea agreement into which he entered should be treated as a binding agreement of the type contemplated by Rule 11(c)(1)(C) because the parties to the agreement stipulated that a particular edition—the 2000 edition—of the United States Sentencing Guidelines Manual would apply. While the guidelines make clear that parties to a plea agreement are empowered to make certain stipulations, see U.S.S.G. § 6B1.4, by no means does the mere presence of an agreed upon term convert the entire plea agreement into a contract binding upon the court. Rather, to create a binding plea agreement, the document itself must include express language referencing Rule 11(c)(1)(C). *See United States v. Ponce*, 50 Fed. Appx. 614, 620-21 (4th Cir. 2002) (unpublished disposition). The plea agreement in this case includes no such reference. Had the parties wished to specify as binding a particular lawful application of the guidelines, they could have expressly so indicated in their agreement.[2]

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[2] Indeed the very fact that plea agreements may take a variety of forms is one of the reasons that each defendant appearing before the court is given several warnings concerning the effect of his or her guilty plea. Fed. R. Crim. P. 11 advisory committee's note (1979) ("Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered.") These warnings are anything but routine and are taken very seriously by the court.

Because the plea agreement in this case was manifestly non-binding, the defendant's request for reconsideration of this court's prior determination concerning the nonbinding nature of the plea agreement is denied.

B.

The defendant next asks the court to consider imposing a sentence within the terms of the plea agreement to grant him the benefit of the bargain reflected in that document. In support of this request, the defendant cites *United States v. Jureidini*, 846 F.3d 964 (4th Cir. 1988), for the proposition that when a defendant pleads guilty in reliance upon "a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 965 (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)). The defendant argues, correctly, that the court thus has an obligation to ensure that the bargain represented by the plea agreement is not frustrated. *Jureidini*, 846 F.3d at 965-66. To determine whether the agreement has been frustrated, it is necessary to determine the precise nature of the bargain and inducement. In this instance the terms of the defendant's bargain require only that the government make certain recommendations to the court, with express recognition of the fact that the sentencing judge is under no obligation to follow the government's recommendations. The government has met its obligation to make the agreed upon recommendations to the court,[3] and therefore the

[3] In *Jureidini*, the Fourth Circuit Court of Appeals viewed both the Parole Commission and the United States Attorney's office as agents of the government and therefore considered each to be independently bound by the terms of the "Government promises" encapsulated in the disputed plea

defendant obtained the benefit of the bargain contained in the plea agreement. The defendant's request for equitable relief requires breach of the agreement, and because this court sees no basis upon which the government may be said to have breached its promises, the requested equitable relief is denied.

III.

Notwithstanding the court's unwillingness to characterize the plea agreement as anything other than a nonbinding recommendation, the terms of which have not been breached, the court does recognize that there is an element of unfairness present in this matter. Accordingly, the court will exercise the discretion granted it by Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure and will permit the defendant the opportunity to withdraw his guilty plea.

It should be noted at the outset that the court takes very seriously the plea agreement and guilty plea process. This decision is not intended to change the basic premise that a guilty plea is not to be undertaken unadvisedly or lightly. With these principles in mind, the court nonetheless recognizes that there may be times when circumstances justify serious consideration of permitting a plea withdrawal.

A defendant may be permitted to withdraw his guilty plea after the court accepts the plea

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agreement. The defendant argues that, by analogy, the United States Probation Office should be bound to the terms of agreements entered into by the United States Attorney's Office. Because of the importance of preserving the independence of the Probation Office, particularly with regard to its role in preparing Presentence Investigation Reports, the court declines to draw the suggested analogy.

but before the imposition of sentence if the defendant can show a "fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A defendant has no absolute right to withdraw a guilty plea, but rather must meet the burden of demonstrating a "fair and just" reason for withdrawal. *United States v. Ubakanma*, 215 F.3d 421, 424 (4th Cir. 2000); *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). In determining whether a defendant has met this burden, a court should consider several factors including: (1) whether the defendant has offered credible evidence that his plea was not knowing or voluntary; (2) whether the defendant has credibly asserted his legal innocence; (3) whether there has been a delay between entry of the plea and filing of the motion; (4) whether the defendant has had close assistance of counsel; (5) whether withdrawal will cause prejudice to the government; and (6) whether withdrawal will inconvenience the court and waste judicial resources. *Ubakanma*, 215 F.3d at 424; *Moore*, 931 F.2d at 248.

The first of these factors—characterized as the key to evaluating the propriety of permitting a defendant to withdraw his guilty plea—is measured by examining whether the Rule 11 plea proceeding was properly conducted. *United States v. Wilson*, 81 F.3d 1300, 1307 (4th Cir. 1996). While a proper Rule 11 hearing creates a strong presumption that a guilty plea was knowing and voluntary, representations made by counsel before a plea hearing are relevant to this inquiry. *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992) ("What happens or is told to the defendant before the hearing and induces the defendant not to change his plea at the hearing may be relevant to the analysis under Rule [11(d)]."). Erroneous or misleading advice of counsel has been held sufficient to justify permitting a defendant to

withdraw his plea where "counsel's performance fell below an objective standard of reasonableness" and where "there was a reasonable probability that, but for counsel's error, [the defendant] would not have pleaded guilty." *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989).

In the case at bar, both the defendant's and the government's attorneys erred in their assessment of how the Sentencing Guidelines might apply in this case. Here, the attorneys mistakenly believed all of the conduct with which the defendant was charged took place before the November 1, 2002 effective date of the 2001 Guidelines Manual. In fact, the last date on which a crime was committed was November 19, 2001, a date expressly specified on the face of the charging document. Accordingly, any misperception by counsel could readily have been corrected by reference to the Information. Because this mistake could have avoided, the court concludes that counsel's performance did not meet the required objective standard of reasonableness.

The court turns now to the second prong of the *DeFreitas* test. Having established that counsel's performance fell below an objective standard of reasonableness, it is nonetheless necessary to establish causation. *DeFreitas*, 865 F.2d at 82. Faced with a choice between going to trial on the one hand, and volunteering guilt in exchange for a life sentence on the other, it seems doubtful that the defendant would have chosen to plead guilty. Because the defendant relied upon improper legal advice in deciding to plead guilty to all twenty counts of the Information, and because counsel's improper advice had a dramatic impact on the anticipated sentencing outcome, the court is of the view that his plea was not in fact knowing

and voluntary to the degree required by justice.

The five remaining factors to be taken into account in assessing whether the defendant has shown a fair and just reason for withdrawal also bear on the court's decision to permit the defendant an opportunity to withdraw his guilty plea. The second and third factors—whether the defendant has credibly asserted his legal innocence and whether there has been a delay between entry of the plea and any motion to withdraw it—weigh against permitting withdrawal in this case as the defendant has not asserted his innocence, nor did he promptly request withdrawal of his plea.

On the other hand, the fourth and fifth factors do tend to support withdrawal. The fourth factor, which examines whether the defendant benefitted from close assistance of counsel, certainly favors withdrawal. As discussed, the defendant had less-than-careful assistance of counsel, a consideration of great importance to the validity of his plea. Examination of the fifth factor—whether withdrawal would prejudice the government—reveals no substantial likelihood of prejudice. During the time between the entry of the defendant's plea and the defendant's motion for reconsideration, not only has the government not lost any evidence essential to proving its case, but it has gained substantial additional evidence concerning the defendant's activities and an accounting of alleged proceeds. The government is certainly in no worse position to make its case or to negotiate a plea agreement than it was at the time of the defendant's initial plea.

Finally, the court has considered the effect of withdrawal on the convenience and resources of the judiciary. It is this court's view that while conservation of judicial resources

must always be of concern to the courts, undue weight should not be placed on this factor. *See United States v. Beahm*, 2000 WL 1460027 (W.D. Va. Sept. 28, 2000) (opinion of Michael, J.). Allowing a defendant to withdraw his plea

> where a guilty plea had been entered will almost always take more judicial resources than if the guilty plea had remained in effect. As this fact will almost always weigh against the defendant, the court places little emphasis on this final factor of the *Moore* test for determining whether a defendant has a fair and just reason for withdrawing his guilty plea.

Id. at *5.

Having carefully considered the *Moore* factors and all of the facts and circumstances of this case, and placing the most weight on the key issue of whether the defendant's plea was knowing and voluntary, the court finds that the ends of fairness and justice would be best served by permitting the defendant the opportunity to withdraw his guilty plea.

IV.

In accordance with the foregoing, the court shall DENY the defendant's July 30, 2003 Motion to Reconsider in its entirety and shall GRANT, sua sponte, the defendant an opportunity to withdraw his December 19, 2001 plea. An appropriate order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to all counsel of record.

ENTERED:

_____

Senior United States District Judge

_____

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,	)	CRIM. ACTION NO. 3:02CR00107
	)	
v.	)	
	)	ORDER
TERRY L. DOWDELL,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED, ORDERED AND DECREED

as follows:

1. The defendant's Motion for Reconsideration, submitted July 30, 2003, shall be, and hereby is, DENIED;

2. To the extent the defendant wishes to withdraw his plea of guilty, the defendant shall be, and hereby is, GRANTED the opportunity to do so;

3. The defendant shall have sixty days in which to file with the court a motion to withdraw his December 19, 2001 plea or to take such other action as counsel may deem appropriate.

The Clerk of the Court hereby is directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
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Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

Having become aware of a clerical error in the Memorandum Opinion dated October 28, 2003, which error does not affect the substance, reasoning, or conclusion of the opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

that the Memorandum Opinion dated October 28, 2003 be, and it hereby is, AMENDED as follows:

1. On page 8, first full paragraph, line 1 — the sentence is corrected to end "the November 1, 2001 effective date of the 2002 Guidelines Manual."

The Clerk of the Court hereby is directed to send a certified copy of this Order to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date